IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 6-3-2006

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

C.R.P. (PD) No.288 of 2004
and
C.M.P.No.3227 of 2004

G. Varadhan .. Petitioner in both the petition

vs.

M.Harigopal .. Respondent in -do-

Civil Revision Petition against the fair and final orders dated 30.12.2003 made in I.A.No.17446 of 2003 in O.S.No.3691 of 2003 on the file of the III Assistant Judge City Civil Court, Chennai.

For Petitioner : Mr.N.Anand Venkatesh

For Respondent : Mr.G.N.Ashoklal

...

O R D E R

This revision has been filed by the defendant in the suit in O.S.No.3691 of 2003 on the file of the III Assistant Judge, City Civil Court, Chennai questioning the legality of the order passed by the trial court in refusing to grant leave to defend.

2. Heard Mr.N.Anand Venkatesh, learned counsel appearing for the petitioner and Mr.G.N.Ashoklal, learned counsel appearing for the respondent.

3. Learned counsel for the revision petitioner has contended that even though the suit promissory notes were executed by three persons, the respondent filed the suit only against the revision petitioner and therefore the revision petitioner was constrained to file the petition before the court below seeking leave of the court to defend. Further, according to him, the other two promisors are the principal debtors and the revision petitioner stood surety for the due repayment of the loan. Hence he has urged that he has got a

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valid defence in the suit.

4. In support of his contention, he relied upon the decision, MECHELEC RENGINEERS AND MANUFACTURERS v. BASIC EQUIPMENT CORPORATION (1976 (4) s.c.c. 687) wherein in paragraph (8), the Apex Court reiterated the dictum of law as laid in KIRANMOYEE DASSI v. DR.J.CHATTERJEE (AIR 1949 CAL 479) in sub para (b) which reads as under:-

> "In SM. KIRANMOYEE DASSI v. DR.J.CHATTERJEE, Das,J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 C.P.C. in the form of the following propositions (at page 253):
>
> (a) .. ..
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend."

Relying on the ratio cited above, learned counsel for the revision petitioner submitted that the revision petitioner has lost a valuable defence in the suit by reason of such refusal to defend the same.

5. In answer to such contention, learned counsel for the respondent has argued and in my opinion rightly that in a suit based on promissory note executed by more than one promisor, one of them cannot be permitted to adduce evidence against the recitals in the document as per Section 92 of the Evidence Act and therefore he has referred me to the decision rendered in KRISTNAYYA v. KARNEDAN (AIR 1935 MADRAS 643) in support of such proposition of law. In this context, it is relevant to extract, the ratio of the decision which reads as follows:-

> "Under Section 4, Negotiable Instruments Act, the maker of a promissory note gives an unconditional undertaking to pay the sum of money mentioned in the note. Under Section 124, Contract Act, a surety is a person who undertakes a liability which is conditional on the failure of another person to discharge the liability. There is thus an essential incompatibility between the position of a surety and that of an executant of a promissory note. Section 92, Evidence Act, forbids proof in variation of the terms of the contract."

6. Having regard to the rival submissions made by learned counsel for both sides in the light of the decisions cited supra, this Court is of the considered view that the revision petitioner is

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not entitled to lead evidence against the recitals in the document under question, namely, the suit promissory note (vide) Section 92 of the Evidence Act. Following the ratio laid down in AIR 1935 MADRAS 643, I am of the opinion that learned III Assistant Judge, City Civil Court, Chennai has correctly held that the revision petitioner has not established a fair or bona fide or reasonable defence to grant the leave as prayed for.

7. For the aforesaid reasons, the impugned order is confirmed and the revision petition is dismissed. However, the revision petitioner is directed to work out his rights in accordance with law. Consequently, C.M.P.No.3227 of 2004 is closed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

dpp

To

The Registrar, City Civil Court, Chennai.

+1cc to Mr.N.Anand Venkatesh, Advocate Sr 10883
+1cc to Mr.G.N.Ashok Lal Advocate Sr 10914

AMB (CO)
km/28.3.

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